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No. 08-995

In the Supreme Court of
the United States

Mostafa Aram Azadpour
(Petitioner),
v.
Sun Microsystems, Inc.,
Matrix Absence Management, Inc.,
Babu Turumella, and
Norman Yeung
(Respondents).

On Petition for Writ of Certiorari to
the United States Court of Appeals for
the Ninth Circuit in
San Francisco

Reply Brief to Respondents' Brief in Opposition

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III. Summary

A.

Petitioner received Respondents' Opposition Brief to his Petition for Writ of Certiorari to the Ninth Circuit on March 02, 2009 which was filed on February 27, 2009.[1] Respondents' having stated no substantive opposition or opposition with merit, wherefore Petitioner prays for a grant of his said Petition (if not summarily grant-vacate-remand with instruction to remand to state-court).[2]

Brevity is gold in writing one's petition and reply. However, Respondents continually write "fables" requiring extensive citation to record and detailed analysis of their cited authorities and why their case-laws do not suffice.

B.

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[1] The Petitioner submitted his Reply Brief, timely, by March 09, 2009. Due to an inadvertent mistake in the number of word-count, Petitioner received a courtesy phone-call from the Court Document Control Clerk on March 12, 2009 informing him that his Reply Brief had exceeded the allotted word-count, the instant Reply Brief constitutes the reduced word-court Reply Brief.

[2] While it is not subject of instant Petition; however, to note that matter of jurisdiction, as-matter-of-law, had been timely questioned; the Petitioner did take an appeal from the order denying remand (*see* Pet. App.: "N," pgs(2-3)) under Dkt No. 06-16294 in July of 2006 (*see* C05-04087-MJJ Docket ID(140)).

Respondents cite from Trial Court (*see* Pet. at 7) order granting them summary-judgment. *See* Opp. Brf. at 9; and, Pet. App.: "J." Within the omitted citation is:

> "<williams v. genetech, inc., 74 cal.app. 4th 215, 226 (1999)>."

which appears in verbatim in Respondents summary-judgment-motion. When a citation has its party's name, and reporter's volume/page, and decision-date "all" erroneous one can not but to pause and to wonder. The Trial Court states it "finds" (or found); however, no citation to indicate based upon which exhibit(s) of Respondents. Therefore, it is rather impossible to assign errors or to challenge such "findings." Summary-dismissal is "not" the purpose of Fed. R. Civ. P. *See* Surowitz v. Hilton Hotels Corp., 383 US 363, 373 (1966).

C.

Respondents removed a not well pleaded complaint "without" doing as little as having deposed then Plaintiff, before case-removal,[3] to ensure that which Respondents in their Opposition Brief (and other papers/briefs in lower-courts) have referred to as "implied" (*see* Opp. Brf. at 1) is not a figment of their "imagination."

"Implication" is not within the well pleaded complaint doctrine.

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[3] *See* Pet. App.: "O," pg(5).

D.

The Independent Medical Examiner/Evaluator ("IME") hired solely at the discretion of Respondent(s), in his objective-medical Report[4] (after having reviewed previous medical records and interviewing/examining the Petitioner) wrote:

> "He [i.e., Mostafa A. Azadpour] does want to produce and does want to return to work."

The IME submitted the said Report as a sworn-to Report and his specialty was being a medical-doctor in psychology and forensic psychiatry; Mark Snyder, MD.

E.

In the "context" of FEHA,[5] any reasonable accommodation to enable a qualified person seeking a reasonable accommodation to perform his/her work; should be "result" of a "timely" and interactive discussion between employee (or his/her duly known representative) and employer (or its duly known representative). Allegation of a timely, interactive, and in good-faith needs to be supported by evidence and not mere averment.

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[4] The said Report was dated December 08, "2003," and was sent to then Defendant Matrix Absence Management, Inc. A redacted-partial of the said Report is in-record of lower-courts.

[5] FEHA: Fair Employment & Housing Act; California Government Code § 12900, et seq.

Here is a partial of an e-mail[6] from Respondent Sun Microsystems, Inc. ("SMI," "Sun," or "SUN") (former employer of Petitioner), human-resource with some imbedded comments from Petitioner:

> "... [March 02, 2004] I [, i.e., Wendy Dunham] don't know why I didn't pass this on sooner [, i.e., in December of 2003 to tell Petitioner that Petitioner needed to contact another group for grievance handling and accommodation request and that this human-resource was not the right person, however, it took her some 3-months to find out she is not the right person; although, she stated, in the same e-mail, that she had worked with this other group before and praised their work, i.e., had prior knowledge of that "other" group] ... I [, i.e., Wendy Dunham] have been very pleased with their [sic] on behalf of employees and managers in PNP ["PNP" stood for processor-and-network-products group]..."[7]

IV. Memorandum of Argument in Reply

1. Respondents Continually Engage in Fraud-on-Court

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[6] Petitioner disclosed such documents during the initial document discloser in C05-04087-MJJ; and, authenticated by the Custodian of Record for Petitioner's Internet Service Provider, the American Telephone & Telegraph; in response to a subpoena served upon the said Custodian of Records.

[7] This is in record of Appeals in Ninth Circuit as Supplemental Excerpts of Record, Vol. 01, Tab-11, pg(1025), from records in C05-03272-MJJ/C06-04087-MJJ.

Respondents by-and-thru Counsel have and continue to engage in fraud-on-court and fraud-on-party. Brief in Opposition at 3 § B. Factual Summary is anything but factual. No citation was made to any exhibit or even a docket entry-number for any of the lower-courts to support "fables" Respondents are presenting as "facts."

The characterization of "morphed" is rebutted by competent medical records, e.g., the IME's Report, hospital record; which Petitioner, then Plaintiff, placed in record (to the point of not being medically confidential) as exhibits. For example: exhibits attached to then Plaintiff's reply to opposition-to-remand in C05-04087-MJJ, Docket IDs (36 & 38); exhibits attached to then Plaintiff's declaration no. 1 in support of sanctions against defendants and their attorneys in C05-04087-MJJ, Docket ID (214); exhibits attached to then Plaintiff's declaration no. 3 in support of his motion for partial summary judgment in C05-04087-MJJ, Docket ID (223).

Petitioner was hospitalized and was on a temporary certified disability in "March" of "2003" not due to any foot surgery, but diagnosed with depression caused/triggered by undue and unreasonable circumstances at work. "No" competent medical doctor, including the IME, would give a certificate of return-to-work to Petitioner; without a change (or examination) of work-circumstances which lead to, or triggered, the said diagnosed depression. Additionally, any return-to-work required a restructuring, e.g., start off on a part-time bases.

Respondents and their Counsel "must" stop this continued fraud-on-court.

2. Why Is It Not Possible to Show a Clear Conflict Among Circuits in re to Case on Bar

Trial Court took removal-jurisdiction pursuant to ERISA[8] "conflict preemption." *See* Pet. pgs(10-13), and, App.: "O." The Ninth Circuit concluded removal-jurisdiction pursuant to ERISA "complete preemption." While the Ninth Circuit did not state where in the removed-state-complaint it found "negligence" against ERISA-plan. *See* Pet. App.: "D," pg(3). That is a conflict.

Neither FEHA nor WARN Act[9] have any statutory intent or cause-effect reliance on SMI's ERISA-plan in the not well pleaded state-complaint (or later in the Fist Amended Complaint ("FAC")). Just because FEHA and WARN Act may require any unjustly denied or withheld "benefit" to be paid to the prevailing employee-plaintiff; that does not make such statute (in the context of ERISA): "... relate to any employee benefit plan."

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[8] ERISA: the Employee Retirement Income Security Act of 1974; 29 USC 1001, et seq.

[9] WARN Act: Worker Adjustment and Retraining Notification Act; 29 USC 2101, et seq.

Since about 1997 on-ward,[10] no Circuit has upheld a state-case removal in a non-diversity case when a substantial state-cause is involved over which that Circuit's US district court has-had no original subject-matter jurisdiction when the defendant removing the state-case had only a colorable "conflict preemption" available to it under ERISA.

The underlying state-cause *in re* to the case on bar, i.e., FEHA, is exclusive to the State of California; therefore, no "conflict" could be among Circuits on that question of law. As Petitioner noted in his Petition, with an opportunity to expand on them in a merit-brief; other Circuits, namely that of the Fifth, Sixth, and Seventh; have held that civil-right state-causes are "not" preempted by ERISA to make such a state-case removable, when as part of damages sought is any back "benefit." *See* Pet. at 28.

The "relate to" ERISA clause has more to it than what Respondents noted in their Opposition Brief. *See* Opp. Brf. at 7. The "missing-link" (as it were) is (*see* 29 USC 1144(a)):

> "... relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975."

When reading 29 USC 1003 (a) & (b); then neither FEHA, WARN Act, nor other such other causes of action in the not well pleaded state-complaint had

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[10] *See* California Division of Labor Standard Enforcement v. Dillingham Construction, N.A., Inc., 519 US 316 (1997).

"any" intent to manage, regulate, fund, etc. "any" benefit-plan (be the "plan" ERISA based or not).

As Petitioner, authoritatively cited in his Petition; the Ninth Circuit's own holdings on matter of ERISA standing and mootness; clearly are opposite to the dispositive memorandum in appeals on bar. *See* Pet. App.: "D;" and, Pet. § VIII.3.B.

3. Original Jurisdiction Does Not Mean Exclusive Jurisdiction

ERISA code § 502(e)(1) (a.k.a., 29 USC 1132(e)(1) referring back to 29 USC 1132(a)(1)(B)) gives expressed "concurrent" jurisdiction to a US district court "and" a state court-of-compete, e.g., State Court of Origin (*see* Pet. at 6), to hear civil-suit for recovery of ERISA-benefit brought by a beneficiary under ERISA code § 502(a)(1)(B) (a.k.a., 29 USC 1132(a)(1)(B)).

The 28 USC 1441(a) in relevant part reads:

> "Except as otherwise expressly provided by Act of Congress, ..."

In a non-diversity case, as case on bar; reading 29 USC 1132(e)(1), 29 USC 1132(a)(1)(B), and 28 USC 1441(a) together; it is crystal-clear, that Congress expressly gave jurisdiction to a state court-of-competent to hear "and" to adjudicate benefit-denied cause of action even when benefit-plan is an ERISA qualified benefit-plan.

A defendant while not waiving any federal defense available to him/her; may remove a state-case within one-year of its inception at a state-court; if/when it becomes apparent that state-case is made removable. *See* 28 USC 1446(b).

Clearly "ripeness" attribute of the federal justiciability doctrine escaped Respondents' attention.

4. Terms Need Context and Footing in Record

Aside from Article III case/controversy requirement, it is a well settled holding of instant Court that just because a federal statute may appear on the face of one's complaint; that, alone, does not make a state-case into a federal case. Additionally, a term/word used in one's complaint needs to be given a "context."

When for example, Petitioner, then Plaintiff, in his state-complaint noted 401(k) as an example of loss he suffered (*see* Pet. App. "K" pg(5)), that pre-income-tax "voluntary" contribution was available "only" for employees who were in "active-status." An employee on a non-active statues (whether off on medical needs or kept off by manufactured delay; as Petitioner suffered); could not contribute to his/her 401(k) account. Under SMI's benefit-package; enrollment in 401(k) was voluntary and management of 401(k) account was left to the employee; i.e., the SMI's 401(k) was not a qualified ERISA-pension-plan (neither did SMI ever claim that it offered an ERISA-pension-plan, nor, did Petitioner ever claim that he was offered an ERISA-pension-plan by SMI). SMI

had a matching program, too; available only to employees who had already voluntarily signed up to participate in 401(k) program, and, were in active employment-status. The matching was denied from Petitioner, too; i.e., Petitioner suffered further loss, for he was not on an active-employee status.

The instant Court has required context to be given when ERISA related suit and terms are on bar. *See* Howard Delivery Service, Inc. v. Zurich American Insurance Co., 547 US 651, 670 (2006); and, Aetna Health Inc. v. Davila, 542 US 200, 313 (2004).

Howard Delivery Service, Inc. v. Zurich American Ins. Co. at 675 citing from US v. Reorganized CF&I Fabricators of Utah, Inc., 518 US 213, 219-224 (1996) states:

> "The definition of a term in one statute does not necessarily control the interpretation of that term in another statute, for where the purposes or contexts are different the terms may take on different meanings."

In the context of FEHA, an employee-plaintiff prevailing on his/her discrimination suit is entitled to recover "any" past benefit due him/her. In the context of WARN Act, a qualified employee laid off is entitled to receive 60-calander-days of "any" benefit due him/her. Neither FEHA nor WARN Act cares or controls what such "benefit" may be or should be; or, even to have any benefit. Neither FEHA nor WARN Act were enacted with an "intent" to control, regulate, define, etc. what an employer's "benefit" plan may be, or, even requiring an employer to have

a "benefit" plan. Neither FEHA nor WARN Act requires any "extra" plan benefit (even when an employer has a benefit plan) to be granted to the prevailing employee-plaintiff.

Aetna Health Inc. v. Davila at 212 states:

> "The duties imposed by the THCLA [THCLA: Texas Health Care Liability Act] in the context of these cases, however, do not arise independently of ERISA or the plan terms [hence the state-case was made removable pursuant to ERISA pre-empting civil remedies not authorized within the civil-enforcement of ERISA scheme]."

However, *in re* to case on bar; the "duties" FEHA or WARN Act set are "independent" of ERISA-benefit "and" ERISA-plan SMI (or any California employer) may had put in-place. FEHA "duty" is the same even if a California-employer does "not" any ERISA-plan/benefit.

5. Analysis of Authorities Cited in Respondents' Opposition Brief

The authorities cited in Respondents' Opposition Brief are not on-point or persuasive for following: (1) not same or similar in procedural background to case on bar, (2) not same or similar on cause of action to case on bar, (3) not addressing lack of ERISA standing on part of Defendants to remove state-case or to maintain state-case in US district court, (4) not addressing lack of US district court's subject-matter jurisdiction both at removal date and judgment entry

date, and (5) not addressing implied "stuff" imagined by Defendants and their Counsel.

In case on bar, Petitioner's alleged breach of contract and/or good-faith dealing is/are *in re* to the "written" offer-of-employment letter SMI and Petitioner executed and SMI not following its written human-resource policies,[11] and, while allowing other employees affected by project-cancelation to seek jobs within SMI; not offering the same "opportunity" to Petitioner. Also, Petitioner alleged violation of his rights-and-privileges "under" FEHA. SMI was not and is not a unionized employer (nor did Petitioner ever alleged otherwise).

Respondents cite the following at various pages of their Opposition Brief:

Devoll v. Burdick Painting, Inc., 35 F.3d 408, 9th Cir. (Cal.) (1994); Ellenburg v. Brockway, Inc., 763 F.2d 1091, 9th Cir. (Cal.) (1985); Ingersoll-Rand Co. v. McClendon, 498 US 133 (1990); Lea v. Republic Airlines, Inc., 903 F.2d 624, 9th Cir. (Nev.) (1990); Reddam v. KPMG LLP, 457 F.3d 1054, 9th Cir. (Cal.) (2006); and, Sparta Surgical Corp. v. National Assn. of Sec. Dealers, Inc., 159 F.3d 1209, 9th Cir. (Cal.) (1998).

Devoll v. Burdick Painting, Inc., is not a non-diversity removed state-case which included state-cause. Extra plan cause of "breach of contract" was brought against ERISA-plan causing "complete

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[11] The said written offer-of-employment letter had terms-and-conditions.

preemption." The former employee suing was a union-member, whose grievance over a collectively bargained salary-and-benefit may be heard in a US district court aside from ERISA cause of action.

Ellenburg v. Brockway, Inc. is not a non-diversity removed state-case which included state-cause. Extra plan cause of "breach of implied covenant of good faith and fair dealings" brought against ERISA-plan causing "complete preemption." The employee was seeking "pension" ERISA-benefit, and, employee was alleging interference with his rights "under" the ERISA-plan.

Ingersoll-Rand Co. v. McClendon plaintiff brought a Texas state suit stating that he was fired, so that his employer would/could avoid having to pay for his "pension" (an ERISA-pension-plan). ERISA has its own enforcement of violation of rights-and-privileges "under" the terms of an ERISA-plan. "McClendon" should have utilized ERISA's civil-remedy to enforcing his rights "under" ERISA-plan.

However, *in re* to case on bar; the Petitioner's then Plaintiff's state-complaint was "not" alleging he was laid off so that SMI would not pay him ERISA long term disability benefit (which pursuant to the terms of the plan had a 2-year maximum duration and would stop, regardless of being laid off or not). The Petitioner then Plaintiff in his state-complaint (which was further refined in his FAC) claimed that he was laid off for "type" of disability he suffered, i.e., depression as oppose to a physical disability and that he was prevented to participate in "any" internal job search because of his disability. Whereas, FEHA sets

a duty upon "any" California employer (which meets the minimum number of employees set by FEHA) not to discriminate based upon one's disability (be it temporary, physcial, etc.). FEHA sets such a duty upon such a California employer "regardless," i.e., independent, of whether or not such an employer has any ERISA-qualified-plan or not.

Lea v. Republic Airlines, Inc. is "not" a state-case removed when its US district court not having had a subject-matter jurisdiction over state-cause. Also, negligence, breach of contract, etc. were asserted against ERISA-plan, i.e., negligence and such causes were "not" independent of ERISA-plan, therefore, "complete preemption" took place.

Reddam v. KPMG LLP is on a remand ordered by its US district court when its US district court erroneously considered it "lacked" subject-matter jurisdiction.

However, the matter on instant Petition is that the Trial Court lacked jurisdiction, both, at "removal" and "judgment-entry" dates.

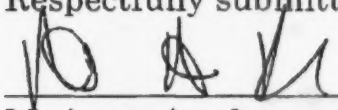
Sparta Surgical Corp. v. National Ass'n of Securities Dealers is not persuasive or guiding. The Respondents misunderstood (if not wholly confused). The statute appealed to in the said case is "exclusively" heard in a US district court. Therefore, dismissing that-cause would mean there was "no" case to be had to be remanded or not. Additionally, the defendant in the said case had an "affirmative-defense-in-law" of "immunity" available to it (nothing

of this sort was, is, or has-been available to any Respondent(s) then Defendant(s)).

V. Conclusion

Pursuant to the foregone, the instant Petitioner respectfully prays that his Petition for a Writ of Certiorari to the Ninth Circuit to be granted as the Respondents' produced no *meritus* or substantive opposition in their Brief in Opposition.

Respectfully submitted,



M. Aram Azadpour, *pro se* Petitioner
Date: March 12, 2009

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Certificate of Compliance

I, the named *pro se* Petitioner on the attached Reply Brief, pursuant to US Code, Title 28, § 1746 certify that in compliance with the US S.Ct. R. 33.1, et seq., the attached Reply Brief to Respondents' Brief in Opposition is:

Proportionately spaced, has a typeface of <12> points in the body and <10> points in the footnote, with typeset of <Century Schoolbook> and contains <2,995> words in total.

Date: March 12, 2009

M. Aram Azadpour, *pro se* Petitioner